# THE RECALL OF JUDGES

BY ALBERT FINK

THE constitution adopted by Arizona provides for the recall of the judges. In California the Legislature has proposed an amendment to the State constitution calculated to accomplish a like result. This will meet the approval of the present Executive and be submitted to the people for acceptance or rejection at an election to be held for this purpose in September or October of this year. Present indications are that it will carry and thus become a part of the organic law of that State.

This principle in the science of government has never received the test of actual trial and its beneficial or pernicious influence rests upon speculative reasoning rather than upon any facts to be gathered from experience.

It would seem wise to remember the words of Mr. Lincoln:

"I do not mean to say we are bound to follow implicitly in whatever our fathers did. To do so would be to discard all the lights of current experience—to reject all progress, all improvement. What I do say is that if we would supplant the opinions and policy of our fathers in any case, we should do so upon evidence *so conclusive* and argument *so clear* that even their great authority fairly considered and weighed cannot stand."

The application of this doctrine to the judiciary, it is thought, would be, if not repugnant to the express terms of the Federal Constitution, at least violative of its spirit. In any event, such a measure is believed to be most inexpedient and incapable of justification either upon principle or experience. It is regarded by some, at least, as a most disastrous experiment in government.

The Federal Constitution provides:

*"The United States shall guarantee to every State in this Union a Republican Form of Government."*

The questions which present themselves are: First, is the independence of the judiciary one of the necessary and essential elements of a republican form of government? And, secondly, is the proposed recall of the judges, without

charges against them preferred, without trial or evidence, and without cause, other than the mere will of the majority of the electorate, that is to say, the dominant party, destructive of their independence?

If these questions are answered in the affirmative, it would seem to follow that the principle contended for would be within the inhibition of the section above quoted.

The first consideration invites an investigation of the proper construction of the phrase, "*A Republican Form of Government.*"

Though this clause of the Constitution has never been directly construed, it has been adverted to in several cases by the Supreme Court.

In Downes *vs.* Bidwell, Mr. Justice Brown said:

"A republican form of government is one in which the supreme power resides in the whole body of the people *and is exercised by the representatives elected by* them."

In Duncan *vs.* McCall it was held that:

"The distinguishing feature of that form is the right of the people to choose their own officers for governmental administration and pass their own laws in virtue of the legislative power reposed in *representative bodies* whose legitimate acts may be said to be those of the people themselves."

From these definitions it would appear that a republican form of government is one in which the power resides in the people and exercised through chosen delegates and not by *direct* action of the electorate.

Or, as stated by Judge Watson, in his recent very excellent work on the Constitution:

"From these comments we may conclude that a republican form of government is one in which the people elect their lawmakers and their public officers."

In Miner *vs.* Happersett, when considering the right of a female citizen of Missouri to vote, Chief-Justice Chase said:

"The guaranty is of a *republican* form of government. No particular government is designated as republican; neither is the exact form to be guaranteed in any manner especially designated. Here, as in other parts of the instrument, we are compelled to resort *elsewhere* to ascertain what was intended. The guaranty necessarily implies a duty on the part of the States themselves to provide such a government. All the States had governments when the Constitution was adopted. In all the people participated, to some extent, *through their representatives.* These governments the Constitution did not change. They were accepted precisely as they were, and it is therefore to be presumed that they were such as it was the duty of the States to provide. *Thus we have unmistakable evidence of what was republican in form* within the meaning of that term as employed in the Constitution."

Thus, in any investigation of a given case resort must be had elsewhere than to the Constitution itself to ascertain what is meant by the phrase in question. Where shall we go?

Judge Watson says:

"What form of government was understood by the framers of the Constitution to be meant by this guarantee? It is entirely probable that the States had in mind forms of government *similar* to those then existing. In other words, a republican form of government within the meaning of this clause is to be tested by the question whether or not such a government conforms to the State governments which existed *at the time* the Union was formed."

Mr. Calhoun said:

"In other words, the forms of the governments of the several States composing the Union *as they stood at the time of their admission* are the proper standard by which to determine whether any *after change* in any of them makes its form of government other than republican."

Writing for the *Federalist,* Mr. Madison said:

"But who can say what experiments may be produced by the *caprice* of particular States, by the ambition of enterprising leaders, or by the intrigue and influence of foreign powers?"

"As long, therefore, as the existing republican forms are continued by the States they are guaranteed by the Federal Constitution."

"The only restriction imposed on them is this, that they shall not exchange republican for anti-republican constitutions; a restriction which, it is presumed, will hardly be considered as a grievance."

It is, of course, admitted that a State may change from one republican form to another. It may even be conceded that if the general form be republican a State may, in minor or unimportant particulars, adopt either the monarchical or democratic principle. But it is contended that the independence of the judiciary is an element of such cardinal importance as to change the *form* when destroyed.

A most casual glance into the history of the formative period of the Constitution will indicate that nothing could have been further from the contemplation of the framers of that instrument than any rendering of the judiciary during their term of office subservient to the will of a majority. The period of quasi-anarchy existing between the latter years of the Revolution and the adoption of the Constitution was replete with events well calculated to impress the subsequent framers of the Constitution.

A monarchical form of government was out of the question. They had just emerged from a bloody war brought

on largely by the personal reign of a Prince. On the other hand, the Trespass Acts of New York, the "Know Ye" measures of Rhode Island, the laws of Massachusetts, Pennsylvania, Maryland, Virginia, and South Carolina obstructing the collection of British debts, the craze for paper money, and "Shays's Rebellion" were incidents that inspired a wholesome dread of democracy uncurbed and unrestrained. The attitude of the patriots toward this form of government may be gathered from some of their utterances.

In the Philadelphia convention Elbridge Gerry said:

"The evils we experience flow from the *excess of democracy.* The people do not want virtue, but are the dupes of pretended patriots."

John Randolph observed:

"That the general object was to provide a cure for the evils under which the United States labored; that in tracing these evils to their origin every man had found it in the turbulence and follies of *democracy;* that some check, therefore, was to be sought for against this tendency of our governments."

Alexander Hamilton said:

"Give all the power to the many, they will oppress the few; give all power to the few, they will oppress the many; both, therefore, ought to have the power, that each may defend itself against the other. To the want of this check we owe our paper money, instalment laws, etc.

"Gentlemen differ in their opinions concerning the necessary checks from the different estimates they form of the human passions. They suppose seven years a sufficient period to give the Senate an adequate firmness from not duly considering the amazing violence and turbulence of the *democratic spirit.* When a great object of government is pursued, which seizes the popular passions, they spread like wild-fire and become irresistible."

It was principally upon the failure of the Constitution to sufficiently recognize the *democratic* principle as contradistinguished from the *republican* which provoked the assaults of such men as Luther Martin, George Mason, Patrick Henry, and Richard Henry Lee.

In the letter to Edmund Randolph, Richard Henry Lee said:

"The only check to be found in favor of the democratic principle in this system is the House of Representatives."

Of Gouverneur Morris, Mr. Madison said:

"He contended for certain articles which he held essential to the stability and energy of a government capable of protecting rights of property against the *spirit of democracy.*"

The then understood distinction between a republican and

democratic form of government was well pointed out by Mr. Madison:

"From this view of the subject it may be concluded that a pure democracy, by which I mean a society consisting of a small number of citizens who assemble and administer the government in person, can admit of no cure for the mischiefs of faction. A common passion or interest will in almost every case be felt by a majority of the whole; a communication and concert result from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property, and have in general been as short in their lives as they have been violent in their deaths."

"A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect and promises the cure for which we are seeking. Let us examine the points in which it differs from the pure democracy and we shall comprehend both the nature of the cure and the efficacy which it must derive from the Union."

"The two great points of difference between a democracy and a republic are: first, the delegation of the government in the latter to a small number of citizens elected by the rest. . . ."

"The effect of the first difference is, on the one hand, to refine and enlarge the public views by passing them through the medium of a chosen body of citizens whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to *temporary* or partial considerations. Under such a regulation, it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the *people* themselves convened for the purpose."

Certainly the fundamental distinctions existing between the several forms of government were well understood, nay, perhaps, to the general public, better than in this era of mercenary thought and specialized learning and culture.

To the members of the Philadelphia Convention the experiments of early Greece in almost every conceivable form of government were known. The primal causes of creation, as well as those of decay and consequent destruction, were matters of daily comment. The so-called "Republics of Venice," the Cantons of Switzerland, the United Netherlands, and the Confederated Principalities of Germany were matters of frequent debate. Comparison of the government proposed for this country with that of England was a constant theme. Excerpts from Sir William Blackstone, Aristotle, and Montesquieu were of universal quotation.

Nor was this learning the result of precursory college reading, such as we find in the present age. The prece-

dents and the underlying principles were deeply studied and distinguished by men in the full prime of intellectual vigor engaged in the task of sifting from the true the false, and in erecting for posterity from the combined thought and experience of all the bygone centuries such a form of government as would, while realizing the most sanguine dreams of the ancients, avoid those hidden reefs upon which so many previous constitutions had come to grief.

So well was this great task performed that since their day men have ceased to busy themselves with the science of creating government as distinguished from its administration, and the general learning and culture then prevalent have in a large measure departed from the land.

The illuminating precedents of history have been all but forgotten, and of the present members of the several State Legislatures it would indeed be a difficult task to find many who, so far from being familiar with accepted axioms of government, have even read the recognized authorities upon the subject.

We have been following a trail blazed for us by abler men, made so perhaps by command of a more imperative historical crisis; and when it is proposed to depart therefrom and enter new and untried bridle-paths, it were well to do so with all the consideration and careful examination of principles and precedents which guided our forefathers and not as a mere temporary expedient against an alleged dominant corporate influence—bad as that may be.

Nowadays we take too much for granted. Lulled to sleep by the unparalleled prosperity we have enjoyed under the Constitution given us by the Fathers, we are prone to believe that human rights and liberties have become so secure as to be in no further need of protection either from the tyranny of a dictator or from that of an unrestrained democracy. Seeing in our path certain resultant evils of our very prosperity, we would, in a sudden moment, lay rude hands upon that instrument under which all this progress has been made possible without pausing to reflect that the evils might be eliminated without recourse to a change in the Constitution; and that by the later experiment, though the evils might be curtailed, the prosperity might be lost. One of our most distinguished citizens is reported to have said that "*republics are still upon trial.*"

It would seem a violent presumption to say that in using

the phrase " a Republican Form of Government " our forefathers did not have in mind the distinction between a democracy and a republic; yet this proposed recall of the judges, so far from being republican in its characteristics, is of the very purest democracy.

It is to be remembered that the form of government selected was new. It had never before been tried. It was an admixture of one great republic with a confederacy of smaller republics, which, in combination, partook in certain aspects of the nature of the former while in others of an alliance of the latter. The system was novel. It was complex. It sought to embrace all the desirable features of former governments while discarding the questionable or dangerous elements. Thus the plan advocated by Hamilton was rejected as being too *monarchical,* while the suggestion to make both branches of Congress elective directly by the people was discarded as being too *democratic* in its tendency.

It will be observed that it was not the intention of the framers of the Constitution to construct a government either monarchical, on the one hand, or democratic on the other, but to find between these extremes some middle ground which would contain the executive strength of the one while avoiding the turbulent and disruptive tendencies of the other. And a *republic* where the government is shared in by all the citizens, and the laws enacted and enforced by representatives chosen by the people, was selected as best calculated to promote our welfare, and it was therefore a *Republican Form of Government,* as opposed to and contradistinguished from any other, that was guaranteed to the several States.

At the time of the adoption of the Constitution each of the several States was republican, and it was *such* a republican form of government as then existed that was intended to be and was guaranteed to each.

Certainly no one would contend that it would be within the power of the people of any State to so alter their present form of government as to place in the hands of one man the executive, legislative, and judicial power. And if, under the Constitution, the people of a State would not be permitted to change their present form of government to one of monarchical tendency, it is not quite clear why they should be permitted to swing in the opposite direction toward a pure democracy without the provided-for concurrence of a

sufficient number of all the States. To preserve a republican form of government is an obligation which each State owes to all the others, and if this obligation is violated the Federal Government will intervene.

The complete and absolute independence of the judiciary was a political maxim of the period during which the Constitution was adopted. It was just as much an essential principle of a republican form of government as the representative scheme. It is sometimes said that the principle was that there was and should be a severance between the executive, legislative, and judicial branches of government. But the statement is, to a certain extent, inaccurate. The underlying principle was the independence of each. The severance was but the means to secure and enforce the principle. Than this principle of independence, none was more fully or firmly established in the science of government. It stood unchallenged. It had long been recognized in England, where, though it was at first believed that the tenure of judges was at the pleasure of the Crown and that they were removable at the whim of the sovereign, this opinion had gradually changed, so that by the end of the sixteenth century the independence of the judiciary was becoming a recognized principle of the Constitution. And it was the violation of this theory as much as any other one thing, and his attempted debasement, to more creatures of the Crown, of the judges of King's Bench, that cost Charles the First his head. Evoked through the slow processes of evolution, which have characterized the formation of the British Constitution, this principle was crystallized into statute law during the reign of William III, when it was enacted, that the judges should not hold their office during the pleasure of the Crown, but so long as they should conduct themselves properly. And during the reign of George III it was enacted that the commissions of the judges should read "during good behavior," excepting that they might be removed "upon the address of both houses of Parliament."

But here it was thought to attain both the practical and theoretical independence, and in this connection it was pointed out by Mr. Wilson that Chief-Justice Holt had successively offended both branches of Parliament by his independence, and if his judgments had occurred at the same time he would have been liable to removal for the performance of his duty.

That this principle, or rather the means to enforce it, was

well recognized in this country cannot be doubted. It was embodied in several of the State constitutions.

That of Maryland provided in the Declaration of Rights:

"That the legislative, executive, and judicial powers of government ought to be forever separate and distinct from each other."

That of New Hampshire provided:

"In the government of this State the three essential powers thereof—to wit, the legislative, executive, and judicial, ought to be kept as separate from and independent of each other as the nature of a free government will admit."

By that of Virginia and Georgia it was provided:

"The legislative, executive, and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other."

While that of Massachusetts of 1780 provided:

"It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws and administration of justice. It is the right of every citizen to be tried by judges as free, impartial, and *independent* as the lot of humanity will admit. It is, therefore, not only the best policy, but for the security of the rights of the people and of every citizen that the judges of the supreme judicial court should hold their offices as long as they behave themselves well."

Montesquieu, the great legal theorist, wrote:

"There is no liberty if the judicial power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. *Then would be an end of everything* were the same men or the same body to exercise these three powers, that of enacting laws, that of executing them, and of trying the cases of individuals."

To remove the judiciary beyond the possible control of a temporary majority, it was provided in each of the thirteen colonies, except Georgia, that the judges be appointed, and in the language of Mr. Fiske:

"It was Georgia that, in 1812, first set the pernicious example of electing judges for short terms by the people. a practice which is responsible for much of the degradation that courts have suffered in many of our States and which will have to be abandoned before a proper administration of justice can ever be secured."

To further insure the independence of the judges the tenure by which they held their offices in each of the thirteen colonies, except Pennsylvania and New Jersey, was, during

good behavior, though, following the English precedent, the constitutions of Massachusetts, New Hampshire, and Delaware provided that they might be removed by the Governor upon the address of both branches of the Legislature.

In the other colonies they were removable only for cause, and by the constitution of Maryland it was provided that they could be "removed only for misbehavior *on conviction in a court of law.*"

Taking the best that existed both in American and English precedents, the same principle was carried into the Federal Constitution, where good behavior was made the tenure and the judges selected by appointment. And in the convention Dickenson, while agreeing that the terms of the judges should be during good behavior, thought they should be removable by the Executive upon the address of the Senate and House of Representatives, after the manner prevailing in England; but Gouverneur Morris pointed out that such power of removal without trial, united with a tenure of office during good behavior, would be a contradiction in terms.

In an instrument where almost every phrase of its proper or possible construction was examined, analyzed, disputed, and debated, from Henry's objections to the use of the phrase "We people," to Martin's criticisms of the abolition of religious tests, it is interesting to note that the provision with reference to the selection and tenure of the judges was agreed to without a dissenting voice. Whatever conflict may have existed upon other points, it is clear that in a republican government an independent judiciary as a cardinal and essential principle was a proposition agreed to by all.

In speaking of the matter, Hamilton said:

"The complete independence of the courts of justice is peculiarly essential in a limited constitution. By a limited constitution I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice in no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this all the reservation of particular rights or privileges would amount to nothing."

"This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men or the influence of particular conjunctures sometimes disseminate among the people themselves and which, though they speedily give place to better information and more

deliberate reflection, have a tendency in the mean time to occasion *dangerous innovations* in the government and serious oppressions of the *minor party* in the community."

"Upon the whole, there can be no room to doubt that the convention acted wisely in copying from the models of those constitutions which have established *good behavior* as the tenure of their judicial officers in point of duration; and that so far from being blamable on this account, their plan would have been inexcusably defective if it had wanted this important feature of good government. The experience of Great Britain affords an illustrious comment on the excellence of the institution."

From these considerations it would seem to appear that at the time of the adoption of the Federal Constitution an independent judiciary was universally considered essential to a republican form of government. To attain and safeguard this end two corollary principles were adopted. Pressing forward the precedent then in existence in England and following that of each of the thirteen colonies, there was a severance of the judicial from the other branches of government. And adopting the rule then prevalent in England, and the colonies other than New Jersey and Pennsylvania, the tenure was made during good behavior.

Necessarily, in the consideration of a question such as this, there will exist between that form of government conceded to be republican and that form admittedly not, a wide borderland. Any given principle will be assigned to the one realm or the other, as the individual mind concedes or negatives its importance. To some an executive elected for life would appear not essentially destructive of a republican form of government when the people retained all other powers. To others the merging of the executive and legislative and the administration of government by committees of one general assembly would seem to violate no principle of republicanism, while still others would no doubt contend that the decision of all causes by committees of a State Senate during the vacation of that body was in violation of no recognized republican maxim. So, the ultimate power residing in the people, the abolition of the legislative branch of the government, and the reference to the whole electorate of every proposed law, as is the present custom of one of the smaller cantons of Switzerland, would appear to some to harmonize with present institutions. There could doubtless be found political thinkers who would affirm the power of the people to do away with the courts and submit, at least all great causes, to the decision of a majority of the citizens.

This chaos of political thought is believed to be the result of a failure to bear in mind the essential distinctions between republican and democratic forms of government. Whatever may be the right of a majority of the people of the whole United States or of the people of the constitutional quota of States to change, modify, or amend their present form of government, it is *ultra vires* the people of any particular State to make it other than republican in form.

While the States reserved to themselves all the powers not granted to the general government, and while the general government has only delegated powers and such powers as are necessary to the enjoyment of those delegated, the right of the several States to so change, modify, or amend their systems as to make them other than republican in form is one which they have relinquished, and the authority of the general government to guarantee to the several States a republican form of government is a power which has been transferred to it by each of the States and such a power as carries with it all powers necessary to its enforcement.

But what are the tests? By what standard is any particular principle to be measured? In what scales are any proposed changes or modifications to be weighed? And who is to be the ultimate judge? These questions, it is believed, are not so difficult as they appear. As before pointed out, the standard is to be that which existed at the time of the adoption of the Constitution. The scales will be found in the opinions and contemporaneous precedents of the same period. The test is to be this: Was the principle embodied in the proposed change one which at the time of the adoption of the Constitution was accepted as one of the cardinal and necessary elements of a republican form of government without which such form could not well exist? If so, then it is one of the essentials of such a form of government and must not be violated. The independence of the judiciary is believed to be such a principle.

As between the prior decision of Congress and the subsequent contrary judgment of the Supreme Court the latter must of course prevail, as that tribunal is the final guardian of the republic. And in this connection, if there is merit in the foregoing considerations, it is to be earnestly hoped that Congress will compel Arizona to modify her constitution so as to eliminate this objectionable feature, thereby giving to the Supreme Court in its ultimate consideration

of the question coming from California the very persuasive precedent of the legislative branch of the government upon this important subject. Nay, the question being one of political rather than judicial significance, the careful consideration of Congress is all the more important, as the admission of Arizona, under her present proposed constitution, might be considered by the Supreme Court as a decision binding upon it that the provision under discussion violated no republican principle.

That the recall of the judges not only tends to *weaken* their necessary independence, but is directly *destructive* thereof, can be easily demonstrated. Such a measure would place the judges and a majority of the electorate in the relation to each other of master and servant. When such a relationship exists and is determinable at the will of the master the servant is without independence. He must obey, not the dictates of his own conscience, but the arbitrary will of his employer, upon penalty of the immediate determination of the relation. The case is otherwise if the relation is to exist for a given time; then the servant so long as he performs his duty is protected from any unjust or arbitrary demands.

The election of judges for stated terms *lessens* their independence of a majority as their term of office draws to a close. The power of their immediate recall *destroys* their independence. As it would be in the teeth of human nature to expect a servant desirous of continuing his employment to disobey the imperative commands of his master, so it would indeed be requiring too much of a judge, who desired to continue in office, to expect him to render an unpopular decision or one which he believed to be such.

If then the measure under discussion is completely subversive of the independence of the judiciary, and if their independence was accepted at the time of the adoption of the Constitution as one of the fundamentals of a republican form of government, without which it would not continue to exist, it would seem to follow that the power of recall of the judges is within, at least, the *spirit* of the inhibition of the clause first quoted if not its very *terms*.

Nor is the measure capable of justification upon the argument of its advocates. Their whole theory of right lies in the following reasoning:

"The people are supreme. What they will is law. The judges are the

servants of the people, employed by the latter, and holding office at their will. Therefore, the master, the people, has the inherent right to discharge the servant, the judges, at pleasure."

The conclusion would seem logically to flow from the premises. Nor is it with the former so much as with the latter that the fault lies. When it is said that the people are supreme, that they employ the judges and stand toward them in the relation of a master to a servant, what is meant is the *majority* of the people. Herein lies the error. The judges are not the servants and agents of the majority. The judges are the servants of both the majority and the minority and must of necessity be independent of each.

Any rule of might is a tyranny whether it be in the form of an emperor, dictator, oligarchy, or democracy. The unrestrained rule of the majority is as objectionable as that of an individual; it is more so, because it has all the evils of the former with none of the efficiency of the latter. This country is ruled by laws and not by majorities. True, the laws are made by majorities, but there are limits beyond which they may not go. Every citizen has certain inherent and fundamental rights which can be taken from him neither through legislative enactments nor by constitutional amendments supported by no matter how great a majority.

Life, liberty, and the pursuit of happiness, the right of contract and private ownership of property, when not used to the detriment of others, of procreation, of inviolability of persons and family—such rights as these are not justly dependent for protection upon constitutions; they are fundamental, inherent. Without their adequate protection no government can long exist. Certainly no majority, however great, has the right to single out the individual and take from him these inherent rights.

It is one of the peculiar functions of a judge in a State governed by laws and not by men to protect the minority or the individual, as the case may be. Though chosen by the majority or by some person or persons to whom the power of selection has been delegated, they cease, upon induction into office, to become the mere servants at will of those by whom they were selected, nay, they never were their servants. The right of selection in no sense carries with it such right of domination as was attempted by Charles I. Upon selection the judges become the servants of the whole people, not of the majority or class by whom they may have

been chosen. They represent the minority, the weakest class in society: the humblest individual, just as much as the dominant political party, the laboring or moneyed classes, or the most potent members of the community. During their term of office they are justly answerable to no one.

A powerful minority may well trust the selection of the judges to a majority, but the domination of this majority after selection is quite another matter. This is tyranny and, as Montesquieu says, "*the end of all things.*" Such a practice, when taken advantage of by majorities, as it inevitably must be, can be maintained only by arms, and this power does not always lie in majorities.

Nor can any justification of the proposed measure be found in the doctrine of expediency. *In limine* let it be inquired, what will be accomplished by the proposed change that is deemed expedient?

Will the respect of the community for the judges, a situation so earnestly to be sought, be increased? Already there has appeared a very wide discrepancy in the esteem entertained by the general public for the State tribunals as compared with that held for the national courts. Why? Obviously for two reasons: The comparative attainments of the presiding judges and the curtailed independence of the State tribunals by reason of the selection of their judges for short terms.

Will the proposed measure induce gentlemen of greater attainments to seek election to the bench? It is believed such will not be the case. What man worthy of the name would submit himself to the alternative of deciding a cause contrary to his conscience or suffering the disgrace of a peremptory recall by his fellow citizens? How can an increase of wholesome respect be attained by a further curtail of that independence, the want of which has already induced disparagement?

Will the corruption charged to exist be eliminated? Where is this corruption? Is there no evidence available? Then, is it the purpose to convict judges without evidence? Is suspicion to take the place of facts? Surely this would seem to be a novel American idea.

Will the alleged corporate control of the judiciary be abolished? Where does it exist to-day? In the Federal or the State tribunals? Certainly from the recent decisions of the former it does not seem to be there intrenched to any

great extent. If in the latter, how will the evil be remedied? The judges are now selected by the majority of the people. If they are now unable to select judges free from corporate influence, may we expect a resultant improvement in the exercise of choice by conferring the power of recall? Why?

How is the fact of a leaning of the judge toward corporate interests to be ascertained? Is it to be based upon errors appearing in his judgments or is it to rest solely upon the fact that the decision was in favor of the corporation? If the former, who is to judge of the existence of the errors? The lawyers who lost the case or those who won? As in any other branch of science, the opinion only of the educated therein will be worthy of consideration. Whose interpretation will be accepted? If the latter, why not proceed at once to the division of corporate property without pursuing the tedious process suggested?

Are the opinions of experts upon the expediency of this measure desired? If there is one man to whom more than any other this age owes a debt of undying gratitude for the preservation of the republic when others in the blindness of political fury were contending for principles which would have guaranteed its early dissolution, that man is John Marshall. Except for the judgments of this great man, the blessings of liberty, for the perpetuation of which the Union was established, would long since have been swept away by the sudden violence of majorities.

Of all the experts who could be called to give opinion upon this subject, he would seem to command the greatest consideration. His patriotism was never questioned. His learning, while perhaps not so scintillating as that of others, was more profound. His luminous judgments give more than ample evidence of the depth of his knowledge of those checks and balances necessary to the preservation of liberty and the guarantee of human progress. The breadth and profundity of his character, the exalted atmosphere in which he lived, his many years' experience as a judge, would seem to render his opinions upon the subject conclusive until overcome by clear and convincing reasoning based upon something more substantial than mere speculation.

When his inspiring career was drawing near its close he was persuaded to become a member of the Virginia Constitutional Convention of 1829. This was a remarkable assembly. It was presided over by James Monroe, escorted to

the chair by Madison and Marshall. Party spirit ran high. Passions were much inflamed. One of the principal questions presented was the tenure by which judges should hold their office. Marshall was at this time in his seventy-fifth year. For nearly a third of a century he had occupied the high position of Chief Justice. He had considered all manner of causes; he had observed all manner of men. Soldier, lawyer, statesman, diplomat, patriot, and himself the greatest judge with which Almighty God had ever adorned a bench or blessed a country, who than Marshall knew better whereof he spoke?

With that great earnestness which had ever characterized his life he said:

"The argument of the gentleman goes to prove not only that there is no such thing as judicial independence, but that there ought to be no such thing; that it is unwise and improvident to make the tenure of the judge's office to continue during good behavior. Advert, sir, to the duties of a judge. He has to pass between the government and the man whom that government is prosecuting—between the most powerful individual in the community and the poorest and most unpopular. It is of the last importance that in the performance of these duties he should observe the utmost fairness. Need I press the necessity of this? Does not every man feel that his own personal security and the security of his property depend upon that fairness? The judicial department comes home in its effects to every man's fireside; it passes on his property, his reputation, his life, his all. Is it not to the last degree important that he should be rendered perfectly and completely *independent* with nothing to control him but God and his conscience? . . . I acknowledge that in my judgment the whole good which may grow out of this convention, be it what it may, will never compensate for the evil of changing the judicial tenure of office. . . . I have always thought from my earliest youth till now that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and sinning people was an ignorant, a corrupt, or a ***dependent*** judiciary."

With Jefferson, the idol of a new-born and triumphant democracy, little doubt can be entertained by those familiar with the history of that day as to the fate of the Federal judiciary had the power now contended for then existed.

Speaking of the Supreme Court, Jefferson said:

"An opinion of the court is huddled up in conclave, perhaps, by a majority of one; delivered as unanimous and with the silent acquiescence of lax or timid associates by a crafty chief judge who sophisticates the law to his own mind by the turn of his own reasoning."

"The very idea of cooking up opinions in conclave begets suspicions that something passes which fears the public ear." . . .

Suggesting the remedy:

"A strong protestation of both Houses of Congress that such doctrines advanced by the Supreme Court are contrary to the Constitution; and if afterward they relapse into the same heresies impeach and set the whole adrift."

Again he said:

"The great object of my fear is the Federal judiciary. That body, like gravity, ever acting with noiseless foot and unalarming advance, gaining ground step by step and holding what it gains, is ingulfing insidiously the special governments into the jaws of that which feeds them."

So blinded was he by party passion that he seems at times to have doubted even Marshall's integrity. In 1795 he speaks of Marshall's "profound hypocrisy." In 1810 he spoke of:

"The ravenous hatred which Marshall bears to the government of his country; the cunning and sophistry within which he is able to enshroud himself. His twistification in the case of Marbury, in that of Burr, and the late Yazoo case shows how dexterously he can reconcile law to his personal biases."

In a letter to Gallatin he speaks of the "deep malignity of Marshall's mind." In a letter to William B. Giles, referring to the Burr case, he said:

"The tricks of the judges to force trials before it is possible to collect the evidence. The presiding judge meant only to throw dust in the eyes of his audience."

"All the principles of law are to be perverted which would bear on the favorite offenders who endeavor to overrun this odious Republic."

During the trial of Mr. Justice Chase, Giles of Virginia, one of Jefferson's henchmen in the Senate, contended that a judge might be removed on impeachment for mere error in judgment or because he differed in political opinion from the President or Congress. In 1807, after the Burr trial, motions were made in each branch of Congress to so amend the Constitution that the judges of the United States courts would hold office for a term of years and be removable by the President on address of two-thirds of both Houses. In 1822 an amendment to the Constitution was proposed giving complete jurisdiction to the Senate in any case to which a State was a party, an adopted method of expressing dissatisfaction in the great judgment of Cohens *vs.* Virginia, now regarded as one of the foundation stones of proper constitutional construction.

Had the power of recall existed, John Marshall would, no doubt, himself have been removed. History would have justified him, but what would have become of the republic?

That the proposed measure is at best a mere experiment in government will be admitted. Going, as it does, to the very root of what is believed to be one of the essentials of free institutions, it must be conceded to be a most dangerous one. To many it seems pernicious—a step in the very opposite direction from those safeguards, checks, and balances believed to be so necessary to protect the whole people from the sudden and violent turbulence of a temporary majority. It has been well said: "Popular sentiment is proverbially variable and is subject to constant alterations; to-day the multitude cry 'Hosanna!' and to-morrow '*Crucify Him!*'"

The situation could not be better described than in the words of Aristotle:

"The people, who is now a monarch and no longer under the control of law, seeks to exercise monarchical sway and grows into a despot; the flatterer is held in honor, this sort of democracy being relatively to the other democracies what tyranny is to other forms of monarchy. The spirit of both is the same and they alike exercise a despotic rule over the better citizens. The decrees of the *demos* correspond to the edicts of the *tyrant;* and the *demagogue* is to the one what the *flatterer* is to the other. Both have great power—the flatterer with the tyrant; the demagogue with democracies of the kind we are describing. The demagogues make the decrees of the people override the laws and refer all things to the popular assembly. And, therefore, they grow great, because the people have all things in their hands, and they hold in their hands the votes of the people who are too ready to listen to them. Further, those who have any complaint to bring against the magistrates say, '*Let the people be judges*'; the people are too happy to accept the invitation and so the authority of every office is undermined. Such a democracy is fairly open to the objection that it is not a constitution at all, for where the laws have no authority there is no constitution."

Surely, if a change is to be made in the existing system prevalent in the vast majority of States, it would seem it should be in the direction of granting to the judges a greater independence of spirit, thereby lifting them to the plane of high efficiency now occupied by the Federal judiciary rather than a still further wholly useless and unnecessary debasement.

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